STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

DALE RANDALL,

Plaintiff/Counter-Defendant,

Case No. 2004-2826-CZ

vs.

STANLEY B. DICKSON JR. and TEMPERATURE ENGINEERING ENTERPRISES INC. d/b/a TEMPERATURE ENGINEERING CORPORATION, a Michigan corporation,

Defendants/Counter-Plaintiffs

vs.

TERRI L. RANDALL,

Third-Party Defendant.

_____/

OPINION AND ORDER

Defendant/Counter-Plaintiffs Dickson (Dickson) and Temperature Engineering Corporation (TEC) moved for summary disposition on plaintiff's complaint pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10).

According to plaintiff's complaint, filed July 2, 2004, plaintiff was a minority shareholder, 5%, of defendant TEC; defendant Dickson the majority shareholder, 81%, and sole director of TEC since its incorporation on November 12, 1996. Plaintiff also alleges that at the time of incorporation, plaintiff paid $25,000 for his shares of stock and defendant Dickson paid $95,000. In addition, plaintiff alleges that both he and his wife personally guaranteed TEC's liabilities to the extent of $140,000; the minority shareholders and their wives personally guaranteed TEC's liabilities to the total extent of $490,000, although the majority shareholder

made no such guarantee. Further, plaintiff alleges that defendant Dickson appointed himself as president of TEC and plaintiff as one of the vice presidents and Chief Operating Officer (COO).

Plaintiff now alleges in his complaint, Count I, that defendant Dickson violated the Michigan Corporation Act, MCL 450.1541a, and MCL 450.1489, by fraudulently mismanaging and misappropriating corporate funds he was not entitled to. Plaintiff alleges a Breach of Fiduciary Duty in Count II; and demands an Accounting in Count III. Further, plaintiff has alleged in Count IV fraud and tortious interference with economic relations; Count V is a claim of wrongful discharge.

Defendants Randall and TEC, as Counter-Defendants, filed a counterclaim against plaintiff on September 30, 2004. Included in the claims are: Count I: breach of contract; Count II, violation of Michigan Corporate Business Act; Count III, breach of fiduciary duties; Count IV, negligence; Count V, conversion; and Count IV, breach of contract guaranty. Terri Randall, as defendant Randall's wife and co-guarantor, was named as third-party defendant.

Defendants Dickson and TEC now move for dismissal of all of plaintiffs' claims.

Standard of Review

Defendants moved under MCR 2.116(C)(7), statute of limitations. Under this subrule, summary disposition is permitted where the claim is barred because of any one of several occurrences. In this case, it is brought under the belief that plaintiff's claims were filed beyond the period set forth in the applicable statute of limitations. In reviewing a motion under this rule, the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp,* 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material

acts exists. *Id.* Summary disposition of all or part of a claim or defense may be granted when a claim is barred because it was filed beyond the period set forth in the applicable statute of limitations. MCR 2.116(C)(7); *Vandenburg v Vandenberg,* 253 Mich App 658, 660; 660 NW2d 341 (2002).

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim, while a motion under MCR 2.116(C)(10) tests the factual support for a claim. *Rorke v Savoy Energy, LP,* 260 Mich App 251, 253; 677 NW2d 45 (2003). Granting a motion pursuant to subrule (C)(8) is proper when the opposing party has failed to state a claim on which relief can be granted, the claim is clearly unenforceable as a matter of law, and no factual development could support recovery. *Id.* When reviewing such a motion, only the pleadings are considered; no documentary evidence may be examined. However, in a action alleging breach of contract, the court may examine the contract in conjunction with a motion for summary disposition for failure to state a claim. *Woody v Tamer,* 158 Mich App 764, 770; 405 NW2d 213 (1987).

In contrast, when considering a motion under subsection (C)(10), the court must consider the pleadings and all documentary evidence, including affidavits and depositions, in the light most favorable to the nonmoving party in order to determine if the moving party is entitled to a judgment as a matter of law. *Id.*

Parties opposing a motion for summary disposition must present more than conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact. *Libralter Plastics Inc v Chubb Group of Ins Cos,* 199 Mich App 482, 486; 502 NW2d 742 (1993). An unsupported allegation which amounts solely to conjecture is insufficient. *Pauley v Hall,* 124 Mich App 255, 263; 335 NW2d 197 (1983). The nonmoving

party cannot rely on mere allegations in order to demonstrate a genuine issue of material fact. MCR 2.116(G)(4); *Rice v Auto Club Ins Ass'n,* 252 Mich App 25, 31; 651 NW2d 188 (2002).

Factual Background

The Court is advised that plaintiff was hired as a sales employee in 1992. In 1993, TEC filed and received Chapter 11 bankruptcy relief; in 1996, because of serious financial difficulties, TEC again filed for bankruptcy protection. At that time, defendant Dickson was the landlord of the premises, and was asked for financial help to save the company. Defendant agreed and loaned TEC $1,200,000, which was subordinated to a Comerica Bank operating line of credit of $3,000,000, which defendant also agreed to personally guarantee. Defendant then undertook all financial obligations and risks and offered several key employees the opportunity to purchase shares in the company. Plaintiff elected to become a 5% shareholder by contributing $25,000 and signed a personal guarantee along with his wife to defendant for $140,000. Six other employees also elected to become minority shareholders. Defendant originally owned 81% but currently owns 79%.

Defendant Dickson then assumed the office of President and became a member of the Board of Directors. Plaintiff was promoted from a position in sales and marketing to Vice-President, Chief Operating Officer, and also became a member of the Board of Directors. Plaintiff's position as vice president and COO meant he ran the daily operations of TEC, second in command only to the President. The Court is further advised that throughout the succeeding years, defendant Dickson made personal advances to the company to keep in operation, and as the real estate landlord, often forewent payments or reduced the rental costs. All shareholders and directors were compensated for personal expenses such as auto leases, insurance and cell phones and the had the opportunity to receive family health insurance coverage.

TEC began to struggle financially again in 2001. In order to avoid another bankruptcy, defendant Dickson made additional subordinated loans to TEC totaling, by 2005, $4,113,286. According to several affidavits submitted, TEC paid $125,000 to settle a sexual harassment suit filed against TEC that alleged plaintiff had committed sexual harassment. With regard to the lawsuit, TEC paid approximately $100,000 in legal services. The affidavits also attest that plaintiff was directly responsible for exercising poor business judgment, including increasing operating costs that placed the company on the brink of bankruptcy. Plaintiff, by way of what appears to be a memorandum, resigned his employment on November 24, 2003 on the basis of what he termed his "wrongful termination of my duties and reduction of my compensation." The memorandum also included a notice that plaintiff intended to seek damages from defendant Dickson for acting beyond the scope of his authority. The Court is further advised that plaintiff secured new employment within 6 weeks of his resignation, at an annual salary of $135,000.

Plaintiff contends that beginning in late 1996, defendant Dickson began and continued a self-serving course of conduct to fleece TEC of its income for his individual benefit, and that he fraudulently mismanaged and misappropriated the funds of the corporation. Plaintiff states that this conduct continued until he voiced his objections in 2003. At that time, plaintiff states a meeting was held with defendant Dickson, plaintiff and the Treasurer/Comptroller in attendance. Following the meeting, plaintiff submits he was removed as COO without corporate authority, and his status changed to one of "salesman." Plaintiff submits that prior to this demotion he had been receiving $150,000 in salaried compensation per annum; following the demotion to salesman, his income was reduced to a commission basis. It is plaintiff's proposition that defendant Dickson knew when he demoted plaintiff that plaintiff had no contacts to support

commission compensation, thus, plaintiff maintains that he was constructively fired by his demotion and such discharge was a wrongful termination.

Applicable Law

Plaintiff has alleged his complaints under MCL 450.1541a and MCL 450.1489. MCL 450.1541a provides:

> (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
> (a) In good faith
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
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> ***
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> (4) ... An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered or should reasonably have been discovered, by the complainant, whichever occurs first.

Defendant argues plaintiff lacks standing to bring an action under this statute, as plaintiff is asking that he alone, as an individual shareholder, be compensated for defendant Dickson's alleged breach of fiduciary duty to TEC, which, according to case law, is not a cause of action in Michigan, as a corporation is treated as a separate entity from its shareholders, even where one person owns all of the corporate stock. *Industrial Steel Stamping Inc v Erie State Bank,* 167 Mich App 687, 692; 423 NW2d 317 (1988). Although plaintiff makes myriad allegations of wrongdoing by defendant Dickson on behalf of the corporation, he has not asserted that these alleged wrongdoings resulted in his injury.

Plaintiff brings his claims under MCL 450.1489 also, which provides that a shareholder may bring an action in the circuit court ... to establish that the acts of the directors or those in

control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

Defendant claims that plaintiff is barred from bringing an action under either statute because of the statute of limitations has run.

The Court is required to look at the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. *People v Adair,* 452 Mich 473, 479-480; 550 NW2d 505 (1996). For a clear understanding of the statutes, the Court relies on Court of Appeals summation of both these statutes as set forth in *Estes v Idea Engineering & Fabrications Inc,* 250 Mich App 270; 649 NW2d 84 (2002). The Court stated:

> Again, we reiterate that the dissent in *Baks v Moroun,* 227 Mich App 472; 576 N.W.2d 413 (1998) and the history of [MCL 450.1]489 and [MCL 450.1]451a demonstrate clearly that § 489 and § 541a have different standards, different parties, different purposes, and different relief provisions. Section 541a applies to all Michigan corporations; § 489 is available only to shareholders of Michigan corporations whose shares are not listed on national securities exchange and are not regularly traded in a market maintained by one or more members of a national or affiliated securities association. Section 489 provides a cause of action for illegal or wilfully unfair and oppressive conduct. This is a different standard of relief than the reasonable person standard set forth in § 541a. Further, as pointed out in the *Baks* dissent, the plaintiff in the § 489 case is a shareholder suing directly whereas a plaintiff in a § 451a action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation. Also, the remedy for a breach of a § 541a cause of action is mandatory whereas the remedy for oppressive conduct under § 489 is discretionary. Additionally, the remedy under § 541a is for the benefit of the corporation and the harm done to it whereas certain of the remedies contained in § 489 are specifically for the benefit of the shareholder, and may not necessarily benefit and could impose obligations on the corporation.
>
> Furthermore, as set forth in the *Baks* dissent, because § 489 creates a separate cause of action and does not contain its own statute of limitations, see the 2001 amendment of 489(1)(f), 2001 PA 57, the catch-all six-year period of limitation set forth in MCL 600.5813 applies.

The *Estes* Court also explained that defendants in a § 489 suit may be either the directors or "those in control of the corporation," whereas the defendants in a § 541a suit are only the directors or officers who have breached their fiduciary duty of care. Further, plaintiffs in a § 489 suit may represent themselves and other similarly situated shareholders and bring their suits as individual or direct actions. The plaintiffs in § 541a suits typically represent the corporation and bring their suits as derivative actions pursuant to § 492a. *Estes, supra* at 282-283. Finally, the six-year period of limitation of MCL 600.5813 provides a shareholder an appropriate amount of time to produce proof of a pattern of oppressive conduct and seek relief pursuant to § 489. *Id* at 282. Therefore, this limitations period best accomplishes the legislative purpose in enacting § 489. *Id.*

In the instant case, MCL 450.1541a does not apply in this case. With respect to MCL 450.1489, plaintiff is at liberty to bring an action under this statute. A § 489 suit seeks to redress oppression that injures either the corporation or the shareholder. *Estes, supra* at 282. However, the Court is convinced that reasonable jurors could differ regarding when plaintiff knew, or with reasonable diligence should have known, of his possible cause of action. Moreover, after reviewing all the documentary evidence submitted by both parties, the Court finds myriad questions of controverted claims and allegations, thus the Court is prohibited from granting a motion for summary disposition based on the statute of limitations. *Moll v Abbott Laboratories,* 444 Mich 1, 26; 506 NW2d 816 (1993). The settled law of Michigan has long recognized where there are disputed facts, the question of whether plaintiff's cause of action is barred by the statute of limitations is a question of fact to be determined by the trier of facts. See *Kroes v Harryman,* 352 Mich 642, 648; 90 NW2d 444 (1958).

Conclusion

For the above-stated reasons, defendants Dickson's and TEC's motion for summary disposition is DENIED, pursuant to MCR 2.116(C)(7) and (C)(10). The Court states that pursuant to MCR 2.602(A)(3), this Opinion and Order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

EDWARD A. SERVITTO
CIRCUIT JUDGE

MAY 18 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

Cc: James Rini, Attorney for Plaintiff/Counter-Defendant and Third-Party Defendant

James Gromer, Attorneys for Defendants/Counter-Plaintiffs

Larry Powe, Attorneys for Defendants/Counter-Plaintiffs